

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HOWARD D. SMITH,

Defendant-Appellant.

UNPUBLISHED

February 6, 2007

No. 263329

Wayne Circuit Court

LC No. 02-008451

Before: White, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Defendant, via both appointed counsel and his own brief filed pursuant to AO No. 2004-6, Standard 4, appeals by delayed leave granted his sentences of three and one-half to seven and one-half years and six months to one and one-half years in prison imposed on his underlying convictions of operating a vehicle under the influence of intoxicating liquor (OUIL), third offense, MCL 257.625(1) and (7), and possession of marijuana, MCL 333.7403(2)(d), respectively, following his conviction of probation violation. We affirm defendant's sentence for OUIL, third offense, but remand for recalculation of the sentence credit to which defendant is entitled, and vacate the sentence imposed on defendant's conviction of possession of marijuana. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with OUIL, third offense, driving while license suspended, second offense, MCL 257.904(1)(a) and (b), and possession of marijuana.¹ The prosecution charged defendant as a second habitual offender, MCL 769.10.²

¹ The offense of OUIL, third offense, carries a maximum sentence of five years in prison. The offense of driving while license suspended, second offense, carries a maximum sentence of one year in jail. The offense of possession of marijuana carries a maximum sentence of one year in jail.

² MCL 769.10(1)(a) authorizes a trial court to impose a prison term one and one-half times the statutory maximum term prescribed for the subsequent offense. The information listed the prior felony as criminal sexual conduct in the second degree (CSC II), the victim being under 13 years of age, MCL 750.520c(1)(a).

Defendant pleaded guilty to the charges. The statutory sentencing guidelines, as adjusted for the habitual offender charge, recommended a minimum term range of seven to 28 months. The trial court sentenced defendant to three years' probation, with the first seven months in jail, for OUIL, third offense, with credit for 103 days served, and to concurrent terms of 103 days in jail for driving while licensed suspended, second offense, and possession of marijuana, with credit for 103 days served. The conditions of defendant's probation required him to obey all laws, to report to his probation officer as required, and to pay costs and fees.³

Subsequently, defendant was charged with violating his probation by failing to report to his probation officer as required, repeatedly failing to verify his address as required by the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*,⁴ and failing to pay \$1,070 in costs and fees. Defendant pleaded guilty to violating his probation.

The trial court revoked defendant's probation and sentenced him to three and one-half to seven and one-half years in prison for OUIL, third offense, with credit for 103 days.⁵ The trial court seemed to be under the impression that defendant also had been placed on probation for the convictions of driving while license suspended, second offense, and possession of marijuana. The trial court ostensibly terminated defendant's probation without improvement for driving while license suspended, second offense, and sentenced defendant to six months to one and one-half years in prison for possession of marijuana, with credit for 103 days. Defense counsel pointed out that the minimum term of three and one-half years for OUIL, third offense, exceeded the guidelines range of seven to 28 months. The trial court opined that the guidelines did not apply to a sentence imposed after a conviction of probation violation, but stated that in any event, defendant's continued failure to register under the SORA constituted a substantial and compelling reason for exceeding the guidelines.

Issues Raised by Appointed Counsel

The statutory sentencing guidelines apply to a sentence imposed after a probation violation. *People v Hendrick*, 261 Mich App 673, 679-680; 683 NW2d 218 (2004).⁶ A trial court may depart from the established guidelines range if it has a substantial and compelling reason to do so, and clearly articulates that reason on the record. MCL 769.34(3). A substantial and compelling reason must be objective and verifiable, must irresistibly attract the attention of

³ The order of conviction and sentence clearly states that the term of probation applies to defendant's conviction of OUIL, third offense.

⁴ Defendant was required to register as a sex offender by virtue of having been convicted of CSC II.

⁵ The imposition of a maximum sentence of seven and one-half years for OUIL, third offense, indicates that the trial court sentenced defendant as a second habitual offender. See MCL 769.10(1)(a).

⁶ *Hendrick*, *supra*, was valid law at the time the trial court erroneously stated that the guidelines did not apply to a sentence imposed for probation violation; however, reversal is not required on this issue because the trial court acknowledged that if the guidelines did apply, it was required to articulate substantial and compelling reasons for exceeding the guidelines.

the court, and must be of considerable worth in deciding the length of the sentence. A substantial and compelling reason articulated by a trial court to merit a departure from the sentencing guidelines must justify the particular departure at issue. *People v Babcock*, 469 Mich 247, 257-261; 666 NW2d 231 (2003).

In determining whether a sufficient basis exists to depart from the sentencing guidelines, the trial court must ascertain whether the departure would result in a sentence more proportionate to the seriousness of the offense and the defendant's criminal history than would adherence to the guidelines range. In departing from the guidelines range, the trial court must determine whether the particular departure is proportionate to the circumstances of the offense and the offender. *Id.* at 262-264; *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

We review the determination of the existence of a factor for departing from the guidelines for clear error, the determination that a factor is objective and verifiable for error, and the determination that objective and verifiable factors merited departure from the guidelines range for an abuse of discretion. A trial court may depart from the guidelines range for nondiscriminatory reasons based on an offense or offender characteristic that was already considered in calculating the guidelines range if the trial court concludes that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Babcock*, *supra* at 265-269. An appellate court must give appropriate deference to the trial court's sentencing determination. *Id.* at 270.

Defendant argues that the trial court abused its discretion by exceeding the guidelines on the ground that he repeatedly failed to update his registration under the SORA. Moreover, defendant claims that the trial court erred in relying on this failure as a reason for exceeding the guidelines because that failure was not found as fact beyond a reasonable doubt as required by *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree.

A condition of defendant's probation in the instant case was that he obey all laws. Defendant admitted that he failed to obey the SORA; by doing so, he acknowledged that he violated the terms of his probation. The fact that the reporting requirement resulted from a separate case was irrelevant. Furthermore, defendant's failure to comply with the SORA was not considered in calculating the guidelines range. The fact that the probation department did not recommend incarceration based on defendant's violation of probation did not prevent the trial court from relying on defendant's failure to comply with the SORA as a basis for exceeding the guidelines. Defendant's failure to comply with the SORA was objective and verifiable, and irresistibly attracted the attention of the trial court. The trial court did not abuse its discretion by exceeding the guidelines based on defendant's repeated failure to comply with the SORA resulting in his violation of probation. *Babcock*, *supra* at 257-261.

Blakely, *supra*, does not entitle defendant to a determination beyond a reasonable doubt that he violated the SORA. In *People v Drohan*, 475 Mich 140, 159-160; 715 NW2d 778 (2006), our Supreme Court held that *Blakely*, *supra*, does not apply to Michigan's indeterminate sentencing scheme.

Issues Raised by Defendant

Probation is not a matter of right, but rather is a matter of grace. A trial court has the discretion to impose conditions on probation. *People v Oswald*, 208 Mich App 444, 446; 528 NW2d 782 (1995). One such condition that a trial court may impose is imprisonment in the county jail for not more than 12 months. MCL 771.3(2)(a).

If an order of probation is revoked, the trial court may sentence the defendant in the same manner and to the same penalty as it could have done if the order of probation had never been entered. MCL 771.4. However, the double jeopardy protections of the federal and state constitutions, US Const, Am V; Const 1963, art 1, § 15, prohibit multiple punishments for the same offense, and thus require an award of credit for time spent in jail as a condition of probation when the defendant is sentenced to prison upon revocation of probation. *People v Whiteside*, 437 Mich 188, 199-200; 468 NW2d 504 (1991).

Initially, the trial court sentenced defendant to three years' probation, with the first seven months in jail for OUIL, third offense, with credit for 103 days previously served.⁷ Upon revocation of defendant's probation, the trial court sentenced defendant to three and one-half to seven and one-half years in prison for OUIL, third offense, with credit for 103 days. Defendant did not request, and the trial court did not grant, credit for the additional time defendant served in jail as a condition of probation.⁸

On appeal, defendant argues that he is entitled to additional sentence credit for the time he served in jail as a condition of probation. Defendant asserts that he is entitled to credit both for the days he actually spent in jail, and for the days of good-time credit awarded pursuant to MCL 51.282. *People v Resler*, 210 Mich App 24, 26-27; 532 NW2d 907 (1995).

We agree, and remand this case for recalculation of the credit to which defendant is entitled on his prison sentence for OUIL, third offense.⁹ When the trial court revoked defendant's probation and sentenced him to prison for OUIL, third offense, the trial court was required to grant defendant credit not only for the time he served in jail prior to the original date of sentencing, 103 days, but also for the time defendant served in jail as a condition of probation. *Whiteside, supra*; *Resler, supra*. The actual number of days defendant served in jail as a

⁷ The judgment of sentence took into account the 103 days defendant had previously served, and provided that defendant was to serve three months and 17 days in jail as a condition of probation.

⁸ To avoid forfeiture, defendant must show that plain error occurred that affected his substantial rights. Reversal is warranted only if the error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005).

⁹ For the reasons discussed below, we hold that the prison term of six months to one and one-half years imposed on defendant's conviction of possession of marijuana is invalid. Thus, the issue of credit to which defendant is entitled on that sentence is moot.

condition of probation, and the amount of good-time credit, if any, he received pursuant to MCL 51.282, is not clear from the record; therefore, we remand with instructions that the trial court calculate the credit to which defendant is entitled and enter an amended judgment reflecting that credit. *Meshell, supra*.

The double jeopardy clauses of the federal and state constitutions prohibit multiple punishments for the same offense. The purpose of these clauses is to protect the defendant's interest in not enduring more punishment that was intended by the Legislature. *People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003).

Initially, defendant was not sentenced to serve a term of probation for possession of marijuana. However, upon revocation of defendant's sentence of probation for OUIL, third offense, and imposition of a prison term for that offense, the trial court also sentenced defendant to serve a prison term of six months to one and one-half years for possession of marijuana, with credit for 103 days. Defendant did not object to imposition of this prison term.

On appeal, defendant argues that the imposition of a prison sentence for his conviction of possession of marijuana violated the prohibition against double jeopardy because he had served the sentence previously imposed, i.e., 103 days in jail, for that offense.

We agree, vacate the sentence of six months to one and one-half years imposed on defendant's conviction of possession of marijuana, and remand for entry of a corrected judgment of sentence. Because no term of probation was imposed for that conviction, no such term could be revoked, and no further sentence could be imposed for that conviction. *Calloway, supra*. The erroneous imposition of a further sentence for possession of marijuana constitutes plain error for which relief is warranted under the circumstances. *Meshell, supra*.

The habitual offender statutes are meant to deter repeat offenders through sentence augmentation. *People v Martin*, 209 Mich App 362, 363-364; 531 NW2d 755 (1995). A prosecutor must file notice of intent to seek an enhanced sentence within 21 days of the arraignment or the filing of the underlying charge. MCL 769.13(1).

Whether habitual offender sentence enhancement can be compounded with enhancement under another statutory scheme depends on the particular provisions at issue. A sentence for OUIL, third offense, can be enhanced under the habitual offender provisions. *People v Doyle*, 451 Mich 93, 96; 545 NW2d 627 (1996). Whether to impose an enhanced sentence is within the discretion of the trial court. *People v Alexander*, 234 Mich App 665, 673; 599 NW2d 749 (1999).

The prosecution timely charged defendant as a second habitual offender. MCL 769.13(1). Originally, the trial court sentenced defendant to three years' probation with seven months in jail for OUIL, third offense, and to concurrent terms of 103 days in jail, with credit for 103 days served, for driving while license suspended, second offense, and possession of marijuana. The trial court mentioned the habitual offender charge in connection with

defendant's conviction of possession of marijuana, but apparently did not enhance these sentences pursuant to MCL 769.10.¹⁰

Upon revocation of defendant's probation, the trial court sentenced defendant to three and one-half to seven and one-half years in prison for OUIL, third offense. The imposition of a seven and one-half year maximum term for OUIL, third offense, indicates that the trial court sentenced defendant as a habitual offender.

On appeal, defendant argues that he was not charged as a second habitual offender in connection with the charge of OUIL, third offense, and thus is entitled to be resentenced to a maximum term of five years in prison for this offense. We disagree.

The prosecutor was entitled to seek sentence enhancement in connection with the charge of OUIL, third offense, *Doyle, supra*, and timely did so by including the habitual charge on the information. The fact that the trial court did not enhance defendant's sentence for the conviction of OUIL, third offense, initially did not preclude the trial court from doing so after it revoked defendant's term of probation. MCL 771.4.

Affirmed in part, vacated in part, and remanded. We do not retain jurisdiction.

/s/ Helene N. White

/s/ Brian K. Zahra

/s/ Kirsten Frank Kelly

¹⁰ The original judgment of sentence does not indicate that the sentences were enhanced.